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No. 95-254 (3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THE AMERICAN LEGION,
BILL ATWELL, CAROL DELANEY-RIDOLFI,
JULIO GONZALEZ, MAREL J. MACKI,
BEVERLY NEHMER and PAUL SUTTON,
Petitioners,

v.

JESSE BROWN, SECRETARY, DEPARTMENT OF VETERANS AFFAIRS; DONNA E. SHALALA, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES; DAVID SATCHER, DIRECTOR, CENTERS FOR DISEASE CONTROL; RICHARD J. JACKSON, DIRECTOR, NATIONAL CENTER FOR ENVIRONMENTAL HEALTH; UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

As to the importance of the questions presented for review, what is most noteworthy about the government's opposition is what it does not dispute. The government does not deny that if, as the veterans argue, the government's conclusion that it was impossible to conduct a scientifically valid Agent Orange exposure study based on military records alone is "arbitrary and capricious", the study's cancellation could adversely affect huge numbers of people: as many as 245,162 Vietnam veterans, and, including their families, an estimated total of 612,905 people.

The government does not deny that an epidemiological study may be scientifically valid even with sizeable random misclassification, and that such a study would discover adverse health effects if they were strong enough. Further, the government does not deny that if the cancellation were vacated as "arbitrary and capricious", and the study conducted, it might discover sufficiently high statistical associations between likely exposure to Agent Orange and various diseases to require the Secretary's granting VA disability and death compensation for Vietnam veterans with those diseases, or their families, respectively.[1] Thus, the government does not deny that, if its study cancellation were held to be "arbitrary and capricious," [2] potentially tens of thousands of individuals might

[1] The government's completion of two other "discretionary" epidemiological studies evaluating possible associations between service in Vietnam and various diseases, Op. Cert. at 3-4, does not undermine the need for, or the importance of, conducting the mandatory study at bar. As the Secretary admits, of the three studies, only the canceled study "was designed as a direct investigation of the effects of exposure to Agent Orange." Op. Cert. at 4.

[2] The government prefers to avoid the question of what benefits the veterans might qualify for if this Court were to vacate the cancellation. Instead, it simply presumes that its scientists' conclu-

receive VA disability or death compensation benefits which they would otherwise not receive.

The government's effort to undercut this petition's importance by arguing that it does not "raise any legal issue of broad application beyond the particular statute at issue in this case[]," Op. Cert. at 15, is misconceived. Initially, resolving the *Gardner/Chevron* question whether, where statutes benefitting veterans are ambiguous, the ambiguity is to be resolved favorably to the veterans or to the agency, would apply to ambiguities in many statutes administered by the Secretary of Veterans Affairs beyond Pub. L. 96-151, *e.g.* 38 U.S.C. § 1101 *et seq.* (disability compensation), § 1301 *et seq.* (death compensation, § 1501 *et seq.* (pensions) and § 1701 *et seq.* (health care).

Similarly, if the Court were to elaborate the extent to which an agency decision based on scientific or technical conclusions must, to avoid being "arbitrary and capricious", contain reasoned explanations of how the agency applied the relevant scientific or technical principles to the facts found to reach its conclusion, that too would apply broadly to all federal departments and agencies which make such decisions, such as the Departments of Defense, Health and Human Services, and Labor and the Environmental Protection Agency. Thus, contrary to respondents' assertion, both of these issues would have "broad application" far beyond the statute at issue in this case.

Moreover, the government's premise that a case may only be important enough for this Court's review if it has impact beyond the statute at issue is unsupported by the cases cited, Op. Cert. at 15, and unsupportable. *Ticor Title Insurance Company v. Brown*, 114 S. Ct. 1359, 1362 (1994), which noted that "the posited constitutional question may be . . . of virtually no practical consequence in fact, except with respect to these particular litigants[]", in-

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sion that the study "would not yield valid results" is unimpeachable. See Op. Cert. at 15-16.

volved only six title insurance companies, 114 S.Ct. at 1360, and an unstated number of title insurance consumers in Arizona and Wisconsin. *Id.* at 1361. The other case cited, *Dobbs v. Zant*, 113 S.Ct. 835, 837 (1993) (Scalia, J., concurring in the judgment), involved only a single defendant in a capital case, 113 S.Ct. at 836-37, and the Court, in fact, granted certiorari.

The principle which Justice Scalia advocated, with Justice Thomas concurring, was that articulated by Justice Stevens: " '[i]t is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law.' *Anderson v. Harless*, 459 U.S. 4, 12, 103 S.Ct. 276, 280, 74 L.Ed.2d 3 (1982) (STEVENS, J., dissenting)." 113 S.Ct. at 837. Far from supporting the government, this principle helps the veterans since the statute whose violation is at issue here is by no means of only "local importance," but affects potentially tens, if not, hundreds, of thousands of people nationwide.[3]

Nor does the fact that VA recently contracted with the National Academy of Sciences "to develop and disseminate a request for proposals to create a 'historic exposure reconstruction model for herbicides in Vietnam[]'," Op. Cert. at 18 n.6, undermine the importance of this Court's deciding this case. Respondents have estimated that it would take approximately two to three years from now just to complete the development of a model. After that, it is speculative whether VA would ever use the model to conduct a large scale study like the Agent Orange exposure study mandated here, and if so, how many more years it would take to complete such a study. But Vietnam veterans are suffering and dying now of diseases

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[3] While the government avers that the decision below "does not conflict with the decision of any other court of appeals, ...", Opp. Cert. at 15, it never responds to the veterans' argument that this case is similar to a nationwide class action in which there would never be a conflict in the circuits.

believed due to Agent Orange exposure, without any VA disability or death compensation for most of the diseases suffered. Gathering health results under the mandated study is long overdue; this Court's review of this case is needed to make it possible for that to happen.[4]

THE VETERANS' HEALTH PROGRAMS IMPROVEMENT ACT CLAIM

a. The government's response to the veterans' arguments that, applying traditional tools of statutory construction, the clear intent of Congress was to require a report of health results before the Secretary could cancel the study consists, essentially, of one sentence: "The court of appeals carefully considered, and rejected, all of petitioners' statutory arguments." Op. Cert. at 14. Respondents' assertion cannot withstand scrutiny.

The court of appeals either never considered, or considered only superficially and incorrectly, various critical tools and canons of construction. We provide two examples. First, determining the meaning of the terms "results" and "progress" was central to construing the statutory provision at issue. This Court has taught that the tool to be used to begin this process is the dictionary. *E.g. MCI Telecommunications Corp. v. American Telephone and Telegraph*, 114 S.Ct. 2223, 2229 (1994). The proffered dictionary definitions of these two terms sharply distinguished between their respective meanings, strongly favoring petitioners' construction. "Result" is

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[4] Nor is the government's congressional inaction and partial reappropriations argument, Op. Cert. at 17-18, entitled to any weight. Insofar as the government hints that the cancellation decision was ratified by appropriation, the district court expressly rejected that very argument. Pet. App. 36a-37a. Insofar as the government suggests that it is not appropriate for aggrieved parties like the veterans here to seek judicial enforcement of a statute that has never been repealed, *see* Pet. App. 36a, because they must instead seek congressional enactment of a new statute reiterating what the law already requires, this Court has repudiated that view. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189-90 (1978).

defined as: "the conclusion or end to which any course or condition of thing leads, or which is obtained by any process or operation." Black's Law Dictionary, 1478 (4th ed. 1957). By contrast, "progress" is defined as: "movement toward a goal." The American Heritage Dictionary, 2nd College Ed., Houghton Mifflin 990 (1985).

The "conclusion or end" of the study was gathering information on health results. The court's construction of "results" of the study, the end of a process, as having been intended to mean merely movement toward conducting the study turned the dictionary definitions on their head. But, the court below refused to examine any dictionary. While the court said that it would have construed "results" differently if the word had a "[meaning] clear[ly] contrary," Pet. App. at 17a, to "progress", by refusing to look at dictionaries it prevented itself from finding out the "clear contrary meaning." [5]

Second, the court never considered what construction was most consistent with the statute's "purpose." That omission is particularly serious here because Pub. L. 96-151's fundamental purpose was to produce study results as to whether veterans likely exposed to Agent Orange disproportionately suffered adverse health effects. If the court had used that tool, it would have weighed heavily in favor of concluding that the "results" Congress wanted before it would allow the Secretary to cancel the study were initial *health* results.[6] The lower court's analysis did

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[5] Indeed, the VA Administrator himself recognized in his first report to Congress on the exposure study that his status report did *not* constitute a report of "results." He noted that the "results" (Congress sought) were "documentation of the study's [health] findings [which] are not yet available, nor will they be until data collection and analysis are completed." App. 207.

[6] Remarkably, the court never reconciles its conclusion that Congress intended to require the Secretary merely to submit a progress report with its concession that *Congress never even "consider[ed] the possibility that the study might not ultimately yield substantive health results. . . ."* Pet. App. 17a n.13 (Emphasis added).

not comport with this Court's principles for performing statutory construction.[7]

The government does not contest that the appellate court's alternative ruling that to read the statute as mandating a report of health results prior to cancellation would lead to "absurd results" depends entirely on the "accuracy," Pet. App. 18a, or legality, of the government's determination that it was impossible to do a scientifically valid study with military records alone. If, as the veterans argue, this government determination was "arbitrary and capricious," the government does not deny that that would nullify the lower court's "absurd results" holding.

b. In arguing that the *Gardner* and *Chevron* canons for resolving statutory ambiguities may never conflict, the government cites *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) for the proposition that courts should " 'give each [provision of a statute] as liberal a construction for the benefit of the veterans *as a harmonious interplay of the separate provisions permits'* " (emphasis added by government), Op. Cert. at 15. However, this principle does not eliminate any conflict between *Gardner* and *Chevron*, and *Fishgold* is distinguishable.

In *Fishgold*, the Court found that the relevant statute's plain language provided protection for a veteran "against . . . loss of seniority by reason of his absence [but that n]o step-up or gain in priority can be fairly implied." 328 U.S. at 285-86. That is, the *Fishgold* statute did not present "interpretive doubt" within the meaning of *Brown v. Gardner*, 115 S.Ct. 552, 555 (1994), or "ambigu[ity]" within the meaning of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

By contrast, here, the appellate court treated the congressionally intended meaning of "results" as ambiguous,

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[7] See generally, Pet. at 17-21.

and, for that reason, deferred to the agency's "permissible construction" under *Chevron*. Pet. App. 14a. The *Gardner* canon, instead, would have resolved the "interpretive doubt" for the veterans.[8] Unlike *Fishgold*, this is a situation of ambiguity: "results" may not be construed both favorably to veterans, as satisfied only by a report of health results, and favorably to VA, as satisfied by a mere progress report. *Gardner* and *Chevron* cannot both control. There is an actual conflict.

Nor would this be "an inappropriate case in which to resolve any conflict. . . ." Op. Cert. at 15. That the precise argument as to the conflict between the *Gardner* and *Chevron* canons was not presented below does not make this Court's review inappropriate, because "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido, Cal.*, 112 S. Ct. 1522, 1532 (1992). A "claim" is defined very broadly. *See Yee*, 112 S. Ct. at 1531-32 ("substantive due process" and "Fifth Amendment's Taking Clause" each constitutes a separate "claim"). Petitioners' argument that the *Gardner* canon

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[8] Insofar as the government is arguing that Pub. L. 96-151 is not the kind of statute to which *Gardner's* liberal construction for veterans canon applies because it does not provide "easily identifiable benefits or protections for individual veterans," Op. Cert. at 15, respondents err. The rationale for this canon does not turn on whether a statute's benefits for veterans satisfy some imaginary standard of "ease of identifiability", but on whether the statute was enacted for the purpose of protecting or benefitting veterans. *See, Fishgold*, 328 U.S. at 284-285; *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

Pub. L. 96-151 was unquestionably enacted to benefit Vietnam veterans by discovering whether diseases they suffered were statistically associated with likely exposure to Agent Orange. If so, Congress was explicit about the benefits individual veterans with those diseases would receive: VA service connected disability and death compensation. *See* 38 U.S.C.A. § 527 note (b) (3). Thus, even if *Gardner* required that the statutory benefits be "easily identifiable", these are.

conflicts with, and should supercede, the *Chevron* canon is merely one argument in support of their statutory claim that the Secretary violated 38 U.S.C.A. § 527 note (a)(3), (b)(2) by canceling the study before reporting any health "results." Therefore, this argument did not need to have been presented below.[9]

THE ARBITRARINESS AND CAPRICIOUSNESS CLAIM

The government asserts summarily that the veterans' arguments that the government's decision to cancel the study was arbitrary and capricious "cannot withstand review of the record in this case." Op. Cert. at 16. What is most striking about this section of the government's opposition is that, in fact, it never identifies any portion of the administrative record which responds to either of petitioners' two actual arguments.

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[9] In any case, if this Court were to hold that the meaning of "results" was ambiguous, it would be a "predicate to an intelligent resolution", *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980), of whether the court below had properly disposed of the statutory claim to decide whether the ambiguity should have been resolved in favor of the veterans under *Gardner*, or in favor of the government under *Chevron*, as actually occurred. For this reason, also, the argument need not have been presented below. *See Vance*, 444 U.S. at 258-59 n.5; *Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978).

Unlike the veterans' "arbitrary and capricious" claim, which, if successful, would result only in vacating the Secretary's cancellation and remanding the matter for reconsideration, their statutory claim would compel the VA to conduct the study at least to the stage of reporting initial health results, subject to the veterans also winning their arbitrariness claim so as to defeat "absurd results." If the canon conflict were not resolved, and the appeals court's decision on the statutory claim were simply affirmed based on *Chevron* deference, the veterans would lose their entire statutory claim, and thereby have no right to have the study conducted nor to receive any death and disability compensation that might ensue. Whereas, were the conflict addressed and *Gardner* held to control, the study would have to be conducted and the veterans would receive any ensuing compensation.

Specifically, the government never cites any record explanation for its conclusion that the military records' misclassification risk was so high that, absent independent verification, it would make the study scientifically invalid; it does not dispute that the sole record explanation is the Subpanel's "feelings." [10] Nor do respondents ever address how the Subpanel's "feelings", by itself, could constitute a "reasoned explanation" for this pivotal conclusion sufficient to avoid rendering the conclusion "arbitrary and capricious." [11]

Similarly, the government never cites any portion of the record which demonstrates that, in reaching the above conclusion, it considered the relevant scientific criteria for determining whether any study's misclassification risk is so severe that it destroys the study's scientific validity. Neither do respondents ever deny that: such scientific principles or criteria exist; for Administrative Procedure Act purposes, they are "relevant factors" which the government legally had to have considered before determining whether this study's misclassification risk was so great it would invalidate the study; and respondents' failure to have considered these "relevant factors" rendered their conclusion "arbitrary and capricious."

While the government fails to rebut the veterans' specific legal arguments, it does confirm the arguments'

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[10] The government never takes issue with the veterans' showing, Pet. at 26-28, that none of the three grounds on which the D.C. Circuit relied, in fact, substantiated the Subpanel's "feelings."

[11] What the D.C. Circuit recently recognized in *Dickson v. Secretary of Defense*, Nos. 94-5190 and 94-5227 (Consolidated), —— F.2d —— (Oct. 31, 1995) (Slip Opinion at 14) is equally applicable here: "an agency's explanation must minimally contain 'a rational connection between the facts found and the choice made.' *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). . . . *Because the* [*agency*] *failed to provide anything approaching a reasoned explanation for its decisions, we hold that the . . . determinations were arbitrary and capricious.*" (Emphasis added) A copy of this decision is being lodged with the Clerk's Office.

underlying factual premises. The government implicitly concedes that the critical determination on which the cancellation decision ultimately rested was "the subpanel['s] conclu[sion] that the potential for misclassification of individual soldiers' exposure status was so great that it would be impossible to obtain valid results from any study in which exposure estimates were based solely on military records." Op. Cert. at 6. It was because of this conclusion that "the subpanel recommended that the Agent Orange study not be conducted without some independent method of verifying exposure assessments based on military records." *Id.* And it was the inability of the "TCDD validation [blood] study [or] any other method", *id.* at 7, to provide such independent verification which ultimately caused the government, including the Secretary, to decide to cancel the Agent Orange exposure study.

In short, the decision to cancel the study rested on the conclusion that the military records' misclassification risk was so great that a study based solely on military records whose accuracy had not been independently verified could not be scientifically valid. Whether or not the Secretary's scientific advisors were "unanimous" in this conclusion,[12] the fundamental fact is that neither they nor the Secretary ever gave any reasoned explanation for it. Zero, plus zero, plus zero, plus zero is still zero; the emperor has no clothes. Because the conclusion was itself "arbitrary and capricious," the decision to cancel was "arbitrary and capricious," and should be set aside.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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[12] Compare Op. Cert. at 16 with Pet. at 26-27 and n.27.

Respectfully submitted,

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